

## **Rule 31, Ariz. R. Crim. P.**

### **AMICUS CURIAE BRIEFS – Filing in Superior Court, in general.....Revised 11/2009**

Although the Arizona Rules of Criminal Procedure do not specifically provide for filing amicus curiae briefs in superior court, in appropriate circumstances the courts may allow amicus briefs to be filed. See *Ackel v. Ackel*, 83 Ariz. 207, 212, 318 P.2d 676, 679 (1957). Rule 31.25(a), Ariz. R. Crim. P., addresses the filing of amicus briefs in appeals from the superior court to appellate courts:

a. Filing and Form of Brief; Participation in Oral Argument. A brief of an amicus curiae may be filed only if accompanied by written consent of all parties or by leave of court granted upon motion. The brief shall be lodged with the motion, if any. The motion for leave shall identify the interest of the applicant state that the applicant has read the relevant brief, petition or motion and shall state the reasons accepting applicant's amicus curiae brief would be desirable.

Assuming that a superior court judge will allow an amicus brief to be filed in a superior court case, an attorney seeking to file such a brief should follow normal procedure and the available rules and seek permission to participate from the parties and/or the court.

An attorney may be sanctioned for filing an amicus brief without the court's permission. The Connecticut Supreme Court upheld sanctions against an attorney in *Thalheim v. Town of Greenwich*, 256 Conn. 628, 775 A.2d 947 (2001). Attorney Thalheim filed with the trial court an "Amicus Memorandum of Law in Opposition of Relief Claimed By Plaintiff," without filing an appearance in the case or receiving permission to file an amicus brief. *Id.* at 631-632, 775 A.2d at 952. The court and attorneys for the parties agreed that the court should not read the brief, and the court subsequently sanctioned Thalheim for filing it. *Id.* at 632, 775 A.2d at 952. On appeal, Thalheim argued in part that the practice rules were void for vagueness because they

did not address the filing of amicus briefs in superior court. *Id.* at 637, 775 A.2d at 955. The attorney general (intervening as defendant in error), argued that “a cursory examination of legal encyclopedias, case law and existing rules of practice would have given Thalheim adequate notice that he was required to obtain court permission prior to filing an amicus brief.” *Id.* at 643, 775 A.2d at 958. The Connecticut Supreme Court agreed, citing various authorities and rules indicating that the appearance of amici is at a court’s discretion. *Id.* at 643-644, 775 A.2d at 958-959. In addition, the Court stated that an attorney “is expected to have superior knowledge on general court procedure based on his status as an attorney and his ability to access literature on court procedure.” *Id.* at 646, 775 A.2d at 960.

A brief filed without obtaining leave of court is the equivalent of an ex parte communication with the court and should be stricken and not read. Judicial Canon 2, Rule 2.9 prohibits a judge from considering ex parte communications or other communications outside the presence of the parties, with certain exceptions. Arizona Supreme Court, Rule 81, Canon 2, Rule 2.9(a) states:

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyer concerning a pending or impending matter.

*Id.* However, the Court may seek advice from a “disinterested expert” on the legal issues in a case. Arizona Supreme Court, Rule 81, Canon 2, Rule 2.9(2). It is “appropriate and often desirable” to invite such a party to “file a brief amicus curiae”. *Id.*, Comment 8.

Local Rules of Practice for the Superior Court, Maricopa County, Rule 2.15(a), requires every pleading to include the name, address, telephone number, and “State Bar of Arizona attorney identification number of the attorney causing the document to be

filed.” With the exception of a *pro per* pleading personally signed by an unrepresented litigant, every pleading filed in an Arizona state court must also be signed by a person admitted to the Arizona State Bar.<sup>1</sup> Rule 31.13, Ariz. R. Crim. P., requires that an amicus brief include the name and State Bar number of counsel representing the party on whose behalf a brief is filed. Therefore, if an out-of-state attorney wishes to file an amicus brief in Arizona, he or she should apply to be admitted to the State Bar *pro hac vice* under Supreme Court Rule 33(c).<sup>2</sup> Appearing *pro hac vice* is within the court’s discretion. Arizona Supreme Court, Rule 38(a)(5).

An amicus brief should not raise new issues in the case. “[I]t is the rule that amici curiae are not permitted to create, extend, or enlarge issues beyond those raised and argued by the parties. *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 84, 638 P.2d 1324, 1330 (1981). Moreover, an amicus brief cannot merely restate a party’s argument. The Comment to Rule 31.25, Ariz. R. Crim. P., states that an amicus brief “should assist the Court, not advocate a particular litigant’s case.” It should not duplicate the briefs of the parties, but should “provide a broader, more abstract presentation of law that is not narrowly tied to the facts of the case.” Rule 31.25, Ariz. R. Crim. P.

Courts in other jurisdictions have addressed when it is appropriate for an amicus to participate in a case.

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<sup>1</sup> See Rule 11(a) of the Arizona Rules of Civil Procedure, which states:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party’s pleading, motion, or other paper and state the party’s address.

<sup>2</sup> “*Pro hac vice*” is Latin for “this time only.” The phrase refers to the application of an attorney from outside a jurisdiction to appear in that jurisdiction’s court for a particular court proceeding, even though that attorney is not licensed to practice in the jurisdiction where the court proceeding is being held. See <http://dictionary.law.com/>.

Historically, *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another. *Amicus curiae* fulfill the role by submitting briefing designed to supplement and assist in cases of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration. An *amicus curiae* is not a party to litigation.

An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case, or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.. Otherwise, leave to file an *amicus curiae* brief should be denied.

*Community Ass'n for Restoration of Environment [CARE] v. DeRuyter Bros. Dairy*, 54

F.Supp.2d 974, 975 (E.D.Wash. 1999) [citations omitted].

District courts have broad discretion to appoint *amicus curiae*. Nevertheless, it has been suggested [that at] the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level where such participation has become standard procedure.

When the party seeking to appear as *amicus curiae* is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear *amicus curiae* should be denied. Where a petitioner's attitude toward a litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.

*Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993)

[citations and internal quotations omitted].

The primary role of the *amicus* is to assist the Court in reaching the right decision in a case affected with the interest of the general public. The *amicus* cannot raise or implicate new issues that have not been presented by the parties. The *amicus* cannot assume a fully adversarial position, and is precluded from engaging in adversarial activities such as motions to compel. Nor may the *amicus* take an appeal. The Court has the discretion to determine the extent and manner of the participation of an *amicus*.

*Russell v. Bd. of Plumbing Examiners of the County of Westchester*, 74 F.Supp.2d 349, 351 (S.D.N.Y. 1999) [citation omitted].

An amicus is not a party to the action and is not permitted to create, extend, or enlarge issues beyond those raised by the parties. *Ruiz v. Hull*, 191 Ariz. 441, 446, 957 P.2d 984, 989 (1998), citing *City of Tempe v. Prudential Ins. Co. of America*, 109 Ariz. 429, 432, 510 P.2d 745, 748 (1973).

Assuming that an amicus brief can be filed in superior court, rules and case law generally provide that the court's permission would be required. In addition, a proper purpose of an amicus brief is to assist the court on issues of law not adequately presented by the parties, not to duplicate and bolster a particular party's motion.